

THE HONORABLE THOMAS S. ZILLY

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON

KEVIN PINE, individually and on behalf  
of all others similarly situated,

Plaintiff,

v.

A PLACE FOR MOM, INC., a Delaware  
corporation,

Defendant.

Case No. 17-cv-1826

**PLAINTIFF'S MOTION TO STRIKE  
DEFENDANT'S MOTION TO DISMISS  
(DKT. 50)**

**Noting Date: February 9, 2018<sup>1</sup>**

<sup>1</sup> Under Local Rule 7, Plaintiff's opposition to Defendant's motion to dismiss is due on Monday, February 12, 2018. Because Plaintiff's motion to strike would also provide relief from the February 12 opposition deadline, Plaintiff set a two-week noting date applicable to motions for relief from a deadline. *See* L.R. 7(d)(2)(A).

1 **I. INTRODUCTION**

2 Plaintiff respectfully moves the Court to strike Defendant A Place for Mom, Inc.'s Motion  
3 to Dismiss (Dkt. No. 50) as untimely and improper under the Federal Rules of Civil Procedure.

4 **II. LEGAL STANDARD**

5 Rule 12 provides that "[a] defendant must serve an answer within 21 days after being  
6 served with the summons and complaint." Fed. R. Civ. P. 12(a)(1)(A)(i). The filing of a Rule 12  
7 motion tolls that deadline. Fed. R. Civ. P. 12(a)(4). However, once a court issues an order  
8 resolving a Rule 12 motion, the tolling period ends and an answer must be filed **within 14 days**.  
9 Fed. R. Civ. P. 12(a)(4)(A) ("If the court denies the motion or postpones its disposition until trial,  
10 the responsive pleading must be served within 14 days after notice of the court's action"); *see also*  
11 *Morrison v. Mahoney*, 399 F.3d 1042, 1047 (9th Cir. 2005) ("[A] motion to dismiss is not  
12 a responsive pleading within the meaning of the Federal Rules of Civil Procedure."); *Shaver v.*  
13 *Operating Eng'rs Local 428 Pension Tr. Fund*, 332 F.3d 1198, 1201 (9th Cir. 2003) ("the motion  
14 to dismiss was not a responsive pleading"); *Stejic v. Aurora Loan Servs., LLC*, No. 09-819-PHX-  
15 GMS, 2009 WL 2970497, at \*1 (D. Ariz. Sept. 11, 2009) ("a responsive pleading includes an  
16 answer, or a reply to an answer, but not a motion").

17 The Court has inherent authority to strike any kind of document. *See, e.g., Ready Transp.,*  
18 *Inc. v. AAR Mfg., Inc.*, 627 F.3d 402, 404 (9th Cir. 2010); *Iota Xi Chapter of Sigma Chi*  
19 *Fraternity v. Patterson*, 566 F.3d 138, 150 (4th Cir. 2007). These "powers are governed not by  
20 rule or statute but by the control necessarily vested in courts to manage their own affairs so as to  
21 achieve the orderly and expeditious disposition of cases." *Chambers v. NASCO, Inc.*, 501 U.S. 32  
22 at 43 (1991) (internal quotation marks omitted). And "Courts of justice are universally  
23 acknowledged to be vested, by their very creation, with power to impose silence, respect, and  
24 decorum, in their presence, and submission to their lawful mandates." *Id.* (internal quotation  
25 marks omitted).

1 **III. ARGUMENT**

2 Defendant's Motion to Dismiss is untimely and should be stricken.

3 This class action lawsuit was filed in the United States District Court for the Northern  
4 District of Illinois on August 7, 2017. *See* Dkt. 1. On September 16, 2017, Defendant filed a  
5 motion to stay proceedings in lieu of filing a responsive pleading to Plaintiff's class action  
6 complaint. *See* Dkt. 14. That motion tolled the deadline to answer Plaintiff's class action  
7 complaint. *See* Fed. R. Civ. P. 12(a)(4). On October 17, 2017, the court granted Plaintiff's  
8 motion to file an amended complaint, Dkt. 28, and Plaintiff Kevin Pine filed a First Amended  
9 Class Action Complaint. Dkts. 30-31.

10 On November 3, 2017, the parties filed a stipulation resolving Defendant's motion to stay.  
11 Dkt. 32. Specifically, Plaintiff agreed to Defendant's request to transfer this action to the  
12 Western District of Washington. *Id.* In exchange, Defendant explicitly agreed that "Defendant  
13 APFM withdraws its Motion to Stay and hereby represents that it will not . . . file a motion to stay  
14 this case based on the pendency of the D.C. Circuit appeal should the Court transfer this action to  
15 [the] Western District of Washington." *Id.* at 3. On November 6, 2017, the court entered an  
16 order withdrawing Defendant's motion to stay and transferring the action to this District. *See*  
17 Dkt. 33.

18 That order triggered Defendant's obligation to file a responsive pleading by November 20,  
19 2017. *See* Fed. R. Civ. P. 12(a)(4)(A) ("[T]he responsive pleading must be served within 14 days  
20 after notice of the court's action."). Because that deadline passed without Defendant filing any  
21 Rule 12 motion, Defendant is required to file an answer.

22 On or about December 12, 2017 – *after* the deadline passed – Plaintiff's counsel reached  
23 out to Defendant's counsel to inquire when Defendant would file a response to the First Amended  
24 Class Action Complaint. *See* the Declaration of Gary M. Klinger attached hereto as Exhibit A  
25 ("Klinger Decl."), ¶ 3. On or about December 19, 2017, Plaintiff's counsel again reached out to  
26 Defendant's counsel to inquire when Defendant would file a "responsive pleading" to the  
27

1 Complaint.<sup>2</sup> *Id.* at ¶ 4. On or about December 28, 2017, Plaintiff’s counsel reached out to  
 2 Defendant’s counsel for the third time to inquire when Defendant would file a response to the  
 3 Complaint. *Id.* at ¶ 5.

4 After several weeks, on December 29, 2017, Defendant’s counsel finally responded with  
 5 an email stating “I will get back to you with a proposed response date by Tuesday of next week.”  
 6 *Id.* at ¶ 6. On January 2, 2018, Defendant’s counsel requested an additional 30 days to file a  
 7 response. *Id.* at ¶ 7. After a period of meeting and conferring, Plaintiff confirmed the parties’  
 8 agreement with an email stating: “Plaintiff is agreeable with a deadline of January 25th for  
 9 APFM to file its response.” *Id.* at ¶ 8.

10 On January 25, 2018, Defendant filed a motion to dismiss rather than an answer. Dkt. 50.  
 11 Confused, Plaintiff’s counsel immediately contacted Defendant’s counsel. *See* email  
 12 correspondence dated January 25, 2018 attached hereto as Exhibit B. Defendant’s counsel claims  
 13 that he recalled mentioning a motion to dismiss in his phone calls with Plaintiff’s counsel in  
 14 January 2018. *Id.*; *see also* Klinger Decl., ¶¶ 9-10. Plaintiff’s counsel, however, has no such  
 15 recollection – and the parties’ written correspondence makes no mention of a motion to dismiss.  
 16 *Id.* at ¶ 11.

17 Based on this record, Rule 12 precludes any motion to dismiss by Defendant. Plaintiff  
 18 specifically negotiated with Defendant for it to withdraw its motion to stay. Based on the parties’  
 19 stipulation, the court in the Northern District of Illinois withdrew Defendant’s motion to stay.  
 20 The result of that court-ordered withdrawal is that Defendant’s deadline to file any Rule 12  
 21 motion was November 20, 2017. That deadline passed without Defendant filing any motion.  
 22 Having missed that deadline, Defendant was left only with the option of filing an answer. When  
 23 Defendant’s counsel reached out about an extension, it never specified that it was requesting an  
 24 extension to file an already untimely motion to dismiss; it asked only for more time to file a  
 25

26 <sup>2</sup> *See Morrison*, 399 F.3d at 1047 (“[A] motion to dismiss is not a responsive pleading within the  
 27 meaning of the Federal Rules of Civil Procedure.”).

“response.” Plaintiff’s counsel only ever understood that to be the nature of the request and their agreement: as a courtesy, they were allowing Defendant to file a late answer, not reviving a passed deadline to move to dismiss. Represented by able and well-qualified counsel, Defendant should be held to the straightforward mandate of Rule 12 and its own stipulation, which dictate that its deadline to file any Rule 12 motion passed on November 20, 2017.

There was no agreement or stipulation to revive that deadline. Indeed, any discussions in January 2018 could not have revived – and did not revive – a deadline that passed two months ago.

#### IV. CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that the Court strike Defendant’s motion to dismiss and require it to file an answer to Plaintiff’s class action complaint.

Respectfully submitted,

Dated: January 26, 2018

By: /s/ Sharon M. Lee

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Classes*

**CERTIFICATE OF SERVICE**

I hereby certify that on January 26, 2017, a copy of the foregoing was filed electronically. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt. Parties may access this filing through the Court's electronic filing system.

/s/ Sharon M. Lee  
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